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Symposium – The First Decade of the Binding EU Charter of Fundamental Rights

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Foreword to the Symposium

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With the deposit of the Czech Republic's instrument of ratification, the Lisbon Treaty entered into force on 1 December 2009. By virtue of this treaty, the EU Charter of Fundamental Rights became a binding primary source of EU law. While not quite the 'constitutional moment' that would have seen the Charter come into force as part of the failed project to equip the EU with a Constitutional Treaty, nonetheless, the Lisbon Treaty—also known as the 'Reform Treaty'—was a significant moment in the history of the development, and reform, of fundamental rights protection in the EU. With the first decade of the operation of the Charter now complete, this Symposium offers a reflection on some of the key lessons to be learned as the Charter moves into its second decade as a binding legal instrument.

Originally conceived as a workshop to be organised by the Centre for European Legal Studies at the University of Cambridge, the effect of the coronavirus pandemic in 2020 meant that the contributions which form this Symposium have been developed more remotely under the guest editorship of Clara Rauchegger. As the outgoing editor in chief of the *Yearbook*, and on behalf of the editors, I want to record our sincere gratitude to Clara for her immense professionalism and intellectual engagement in delivering this Symposium.

The four substantive contributions focus on core structural issues rather than the interpretation of specific rights. The intention is to reveal and critique particular patterns of fundamental rights protection within the EU legal order, including the role played by national courts within that legal order.

In her article, Emily Hancox goes to the heart of the significance of the Charter as a written and binding source of primary law in her argument that we should displace general principles as sources of fundamental rights protection in favour of the framework of the Charter itself. While leaving open a space for general principles to allow for the recognition of new principles, she argues against viewing the Charter as either a mere declaration of existing general principles or as a parallel source of protection in conjunction with general principles. As the Charter moves out of its infancy as a

binding source of law, Hancox urges us to take seriously the Charter's status as the primary source of fundamental rights protection within the EU legal order.

The enforcement of human rights against non-state actors is a controversial and much-debated aspect of fundamental rights protection in both domestic and international contexts. It has a particular salience in the context of the EU given its linkage to the doctrine of direct effect which has both vertical and horizontal dimensions. But as Eleni Frantziou elaborates in her contribution, while the first decade of the Charter has seen the Court of Justice of the EU ('CJEU') clarifying the potential for the Charter to be applied 'horizontally', the legacy of direct effect within the EU legal order may be an impediment to thinking more expansively about what 'horizontality' should or should not mean in the context of the protection of fundamental rights through the Charter. Considering the evidence from the CJEU's case law, Frantziou explores strategies for rights protection that seek to avoid charges of judicial overreach.

In the contributions from Aida Torres Pérez and Clara Rauchegger attention turns to the Charter and its application to, and deployment within, the Member States. That the Charter is limited in its scope of application to the Member States in their implementation of Union law represents an attempt to demarcate the respective competences of the Union and the Member States in the protection of fundamental rights. While the jurisprudence of the CJEU has seen that boundary line expanded to bring a range of apparently 'national' situations within its scope, the structure of the Charter suggests that the boundary remains an intrinsic structural feature as evidenced by the CJEU's reluctance to review domestic austerity measures taken in compliance with EU-derived financial support systems. But as Torres Pérez argues, the interpretation given to Article 19 of the Treaty on European Union in securing effective judicial protection of the rule of law offers a route for the expansion of the reach of EU fundamental rights. Recent examples of rule of law backsliding in the Member States have provoked the CJEU to find means and mechanisms to link apparently domestic interventions to EU standards of judicial and fundamental rights protection.

However one draws the boundary between the competence of the Union and the Member States for the protection of fundamental rights, as a source of binding EU law, the Charter may itself be invoked before the courts of the Member States. Given the presence of domestic instruments of fundamental rights protection, national courts have to mediate between and reconcile the applicability of Union and national sources of fundamental rights. For Rauchegger, this process of negotiation between these sources produces both consistency and variation between the Member States. Comparing the approaches of courts in Germany, Austria, and Italy, the life of the Charter beyond its interpretation by the CJEU is revealed with courts in different jurisdictions using a range of techniques to manage the presence of this 'external' fundamental rights instrument within its jurisdictional borders. Importantly, as the examples of the 'right to be forgotten' cases before the German Constitutional Court make clear, adjustments and recalibrations are taking place within each domestic legal order as they respond to the reach and influence of the Charter.

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Together these contributions make a powerful case that the Charter is anything but a declaratory instrument. Not only is it a source of enforceable substantive norms in the sphere of fundamental rights, its presence has provoked change within the underlying structure of the EU legal order. If the 'foundational' period of the Union was characterised by a particular type of legal transformation manifested in the doctrines of direct effect and primacy (both safeguarded by general principles of EU law that ensured EU law complied with fundamental rights),[1] the era of the Charter is one that takes fundamental rights beyond its protection of other 'constitutional' doctrines to become a driving force of EU constitutionalism itself. That is not without its risks. Processes of legalisation and judicialization are not substitutes for other types of political and democratic reform. EU law and its system for fundamental rights protection can only bear a certain amount of normative weight (and even that will be open to criticism).

As always, the domain of European Legal Studies as a field of enquiry must remain open to the wider context in which sources of law—including the Charter—operate and interact with the social, economic, and political phenomena that often underlie the disputes from which Charter litigation arises. The Charter has grown in prominence during periods of social, economic, and political crisis within and beyond the Union. But while Charter litigation dramatizes contemporary crises and conflicts it has a limited capacity to resolve them. More than a decade after the Reform Treaty made the Charter a binding legal instrument, it is time for the Union to think more deeply about what reform really looks like.

[1] JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

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